No. 49636-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK IPPOLITO

Appellant,

v.

LEAH AND "JOHN DOE" HENDERSON,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY

THE HONORABLE SUSAN SERKO

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. RESPONDENT'S BRIEF MISSTATES THE HOLDING FROM THE *THOMAS-KERR* OPINION AND IS CONTRARY TO WELL ESTABLISHED LAW OF THE STATE OF WASHINGTON.

The issue before the Court in *Thomas-Kerr v. Brown*[1] was whether a Plaintiff who had not filed a request for trial *de novo* following arbitration was, thereafter, allowed to move for voluntary dismissal pursuant to CR 41(a).

The *Thomas-Kerr* Court held that a Plaintiff who has not filed a request for trial *de novo* following mandatory arbitration, is not thereafter allowed to move for voluntary dismissal pursuant to CR 41(a).

Respondent has repeatedly and consistently misstated the issue from the *Thomas-Kerr* opinion in an effort to support Respondent's erroneous argument that a Plaintiff may never move to dismiss pursuant to CR 41(a) following arbitration *even when the Plaintiff has filed a timely request for trial de novo.* This was not the issue before the *Thomas-Kerr* Court and it was not the issue that was ruled upon by the *Thomas-Kerr* Court.

In addition, Respondent's erroneous argument is directly contrary to well-established Washington law.[2]

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[1] 114 Wn.App. 554, 59 P.2d 120 (2002).

[2] *See*, ***Wiley v. Rehak***, 143 Wn.2d 339, 20 P.3d 404 (2001) (*citing Perkins Coie v. Williams*, 84 Wn.App. at 743 (1997)) (*A full trial need not occur and fees may be awarded following a summary judgment or voluntary dismissal, or when the appellant voluntarily withdraws the notice for a trial de novo.*); ***Perkins Coie v. Williams***, 84 Wn.App. 733 929 P.2d 1215 (1997) (*Courts have awarded fees against appellants who failed to improve their position both at trial de novo and on appeal. A full trial need not occur. Fees may be awarded following summary judgment or voluntary dismissal, or when the appellant voluntarily withdraws the request for a trial de novo.*); ***Walji v.***

The Respondent's argument relies entirely upon a deliberate mischaracterization of the last sentence of the *Thomas-Kerr* opinion which Respondent has taken out of context from the rest of the opinion. The *Thomas-Kerr* Court held that a Plaintiff who failed to request a trial *de novo*[3] following arbitration was *thereafter* precluded from requesting a motion for dismissal pursuant to CR 41(a). The final paragraph of the opinion, read in its entirety, is obviously intended as a summary of the Court's ruling and not intended to address an entirely new and different legal issue, as Respondent erroneously attempts to argue.[4]

The Respondent is asking this Court to 1) expand the ruling of the *Thomas-Kerr* opinion far beyond the limited issue before the Court in *Thomas-Kerr*, and 2) overrule a line of cases dating back at least 20 years from the Washington Supreme Court as well as Division I and Division II of the Courts of Appeal[5]:

> **Under the Thomas-Kerr holding, MAR 6.3 allows only two options following the presentation of the arbitrator's award: trial de novo or entry of judgment on the arbitrator's award.**[6]

Candyco, Inc., 57 Wn.App. 284, 787 P.2d 946 (1990) (*This court's recent decision in* ***Nguyen v. Glendale Construction Co., Inc.***, *is controlling. The award of attorney fees under MAR 7.3 after a voluntary nonsuit was affirmed as being within the discretion of the trial court.*); ***Nguyen v. Glendale Construction Co., Inc.***, 56 Wn.App. 196, 782 P.2d 1110, (1989), *review denied*, 114 Wn.2d 1021, 792 P.2d 533 (1990).

[3] Mr. Ippolito timely filed a request for trial *de novo* following arbitration, thereby preserving his right to move for voluntary dismissal pursuant to CR 41(a). In *Thomas-Kerr*, the Plaintiff failed to request a trial de novo following arbitration which is why he was precluded from moving for voluntary dismissal pursuant to CR 41(a).

[4] *See*, Amended Brief of Respondent, Pg 3 "*...the unequivocal holding in Thomas-Kerr*".

[5] *See*, *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001); *Perkins Coie v. Williams*, 84 Wn.App. 733, 929 P.2d 1215 (1997); *Walji v. Candyco, Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990); *Nguyen v. Glendale Construction Co., Inc.*, 56 Wn.App. 196, 782 P.2d 1110, (1989), *review denied*, 114 Wn.2d 1021, 792 P.2d 533 (1990).

This argument by Respondent is directly contrary to the Washington Supreme Court's ruling in *Wiley v. Rehak*, as well as the Courts of Appeal decisions in *Perkins Coie v. Williams* (1997 Div. I), *Walji v. Candyco, Inc.* (1990 Div. II), and *Nguyen v. Glendale Construction Co., Inc.* (1989 Div. I).[7] As this line of cases illustrates, the Respondent's argument is an erroneous interpretation of the Court's ruling in *Thomas-Kerr*. The plaintiff in *Thomas-Kerr* was prevented from voluntary dismissal under CR 41(a) because the plaintiff in that matter had failed to request a trial *de novo* following arbitration.

Unlike the Plaintiff in *Thomas-Kerr*, Mr. Ippolito timely requested a trial *de novo* following arbitration and, therefore, the arbitration award did not result in a judgment against Mr. Ippolito as it did against the plaintiff in the *Thomas-Kerr* decision. Again, however, the Respondent deliberately attempts to mislead this court by erroneously claiming that the facts of the present matter are "similar" to the facts of *Thomas-Kerr*. A fair reading of the *Thomas-Kerr* opinion clearly illustrates that the ruling of the Court in that matter was limited to the facts before the Court in that matter, and those facts are completely different from the facts in the present matter.

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[6] *See*, Amended Brief of Respondent, Pg 4.

[7] *Id.*

B. RESPONDENT'S CRITICISM OF PLAINTIFF'S APPROPRIATE AND ALLOWABLE MOTION FOR VOLUNTARY DISMISSAL PURSUANT TO CR 41(a) IS NOT RELEVANT TO THE COURT'S REVIEW HEREIN.

A significant portion of Respondent's memorandum is devoted to a discussion of Respondent's apparent dislike for Cr 41(a) motions. Respondent characterizes the use of CR 41(a) as, *inter alia*, "a loophole", "a charade", "legal gymnastics", "procedural tactics", and "manipulating procedure". Respondent goes on to argue that the use of CR 41(a) leads to "prolonged litigation", "excessive expense", and "judicial inefficiency".

However, CR 41(a) motions are a common practice in Washington Courts and Respondent's apparent vehement dislike for such motions is not relevant to the Court's review herein. There is nothing procedurally improper about a motion to voluntarily dismiss pursuant to CR 41(a). As illustrated by the cases cited herein, MAR 7.3 sets forth remedies which were available to the Defendant in the present matter. A request for relief pursuant to MAR 7.3 would have been the appropriate response from the Defendant herein when Mr. Ippolito moved to voluntarily dismiss pursuant to CR 41(a).

II. CONCLUSION

Well-established Washington law allows a Plaintiff who timely requests a trial *de novo* following mandatory arbitration to, thereafter, move for a voluntary dismissal pursuant to CR 41(a). Therefore, the trial

court erred in denying Mr. Ippolito's motion for voluntary dismissal pursuant to CR 41(a) herein.

Pursuant to the foregoing, Mr. Ippolito respectfully requests that the Court reverse the trial court's denial of his motion for voluntary dismissal pursuant to CR 41(a) and remand this matter to the trial court for action consistent therewith.

DATED this 4th day of May, 2017.

WICKENS LAW GROUP, P.S.

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Attorney for Mark Ippolito

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

MARK IPPOLITO,	)	
	)	
Appellant	)	**No. 49636-4-II**
	)	
v.	)	
	)	
	)	**DECLARATION OF**
LEAH and "JOHN DOE" HENDERSON,	)	**SERVICE**
	)	
	)	
Respondents	)	
	)	

I, Susana Samaniego, declare under the penalty of perjury of the Laws of the State of Washington that on this date I did send by Legal Messenger, a true and correct copy of the **1) Reply Brief of Appellant,** to Law Office of Shahin Karim at 520 Pike St., Ste 1300, Seattle, Washington 98101.

In addition, I also sent a true and correct copy of this same document by US Mail, postage pre-paid to the Appellant, Mark Ippolito at 3438 I ST NE #Q204, Auburn, Washington 98002.

DATED at Tacoma, Washington, this 4 day of May, 2017.

Susana Samaniego, Legal Assistant